

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP2554-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2013CF230

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN R. LUECKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Justin R. Luecke appeals from a judgment convicting him of possession of tetrahydrocannabinols (THC), second or subsequent offense. Luecke pleaded guilty after the court denied his motion to

suppress, in which he argued that the warrantless search of his vehicle was unlawful. We affirm.

¶2 Testimony at the hearing on the motion to suppress set forth the facts leading up to Luecke's arrest. Luecke got in line at the pet store behind off-duty state trooper James Reese. Reese "[i]mmediately ... detected an overwhelming odor of raw marijuana about that subject's person." Reese watched Luecke go to his car and then followed him. Reese called the Sheboygan County Sheriff's Department and advised them that he had smelled marijuana on a person, that he was following that person, and gave a description of the individual and the individual's vehicle. Reese continued to follow the vehicle until Deputy Jarrod Fenner conducted a traffic stop on the vehicle.

¶3 Fenner testified that after he stopped Luecke, Luecke only lowered his window about an inch to talk to him. Fenner said from his past training and experience that this behavior can indicate that the person in the vehicle is trying to hide an odor in the vehicle. Fenner asked Luecke to exit his vehicle, and, when he did, Fenner "could smell the strong odor of raw marijuana emanating from the interior of the vehicle." Fenner smelled the strong odor of marijuana coming from both Luecke's person and the interior of the vehicle and could not distinguish between the two. A pat-down search of Luecke revealed nothing. Fenner searched the vehicle while Luecke stood by with a backup officer who had arrived. Fenner found a bag containing a green, leafy substance which he identified by appearance and odor as marijuana. A field test confirmed that the substance was marijuana. A subsequent search of Luecke's person revealed an additional bag of marijuana.

¶4 Luecke was charged with possession of THC, second and subsequent offense. Luecke moved to suppress the evidence, arguing that the search of the vehicle was unlawful. The circuit court denied the motion to suppress, finding that Fenner “could actually smell the odor coming from the car as soon as [Luecke] got out and opened the door making it clear that there was probable cause.” Luecke pleaded guilty and was convicted. This appeal follows.

¶5 Our review of an order denying a motion to suppress is mixed. We uphold the circuit court’s findings of facts unless clearly erroneous; we review independently the application of the law and constitutional principles. *State v. Lefler*, 2013 WI App 22, ¶6, 346 Wis. 2d 220, 827 N.W.2d 650.

¶6 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches. *Lefler*, 346 Wis. 2d 220, ¶7. A warrantless search is unreasonable unless it comes within an exception. *Id.* The automobile exception applies when “police have probable cause to believe that a vehicle contains evidence of a crime.” *Id.* (citation omitted). Probable cause to search exists if there are sufficient facts to “excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.” *Id.*, ¶8 (citation omitted). Probable cause must be viewed in light of the knowledge and experience of the police, considering the totality of the circumstances existing at the time of the search. *Id.* Furthermore, our Wisconsin Supreme Court has recognized that the odor of marijuana emanating from a vehicle provides probable cause for an officer to believe that the vehicle contains evidence of a crime. *State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999). In addition, in order to search a location, the police do not need to have probable cause to believe evidence will be found in that location to the

exclusion of all other locations. *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988).

¶7 Luecke does not dispute the legality of the traffic stop. Rather, Luecke argues that the automobile exception does not apply because the officer did not have probable cause to believe that there was marijuana in the vehicle. Luecke states, “It was only after Officer Fenner went back to the vehicle a second time and began his search that he noted the odor of raw marijuana in the car itself.”

¶8 Fenner’s actual testimony is that he smelled “the strong odor of raw marijuana emanating from the interior of the vehicle.” On cross-examination, Fenner confirmed that as Luecke exited the vehicle Fenner could smell a strong odor of raw marijuana from the interior of the vehicle. When asked if he could smell a distinct odor of marijuana from the vehicle as opposed to on Luecke’s person, Fenner stated that he “returned to the interior of the vehicle and there was a distinct odor of marijuana still in the interior of the vehicle.” When asked what reasons he relied on to search the vehicle without a warrant, Fenner replied, “From the odor of the raw marijuana emanating from the interior of the vehicle when I made contact.”

¶9 The strong smell of marijuana coming from the vehicle, coupled with Reese’s report that Luecke’s person had smelled strongly of marijuana and Luecke’s mere cracking of the window when talking to Fenner constituted “sufficient facts [to] excite an honest belief in a reasonable mind that the objects sought are linked to the commission of a crime, and that the objects sought will be found in the place to be searched.” *Lefler*, 346 Wis. 2d 220, ¶8 (citation omitted). Luecke seems to argue that because Fenner could not be certain whether the strong

odor of marijuana coming from the vehicle was actually odor caused by Luecke's person, it was only a hunch that the odor in the vehicle was coming from something other than Luecke. That argument fails. Fenner testified that he could smell the odor coming from the vehicle as and after Luecke exited the vehicle. Under the totality of the circumstances, there were "sufficient facts [to] excite an honest belief in a reasonable mind" that marijuana would be found in Luecke's vehicle. *See id.* (citation omitted); *see also Secrist*, 224 Wis. 2d at 210 (strong odor of raw marijuana coming from the vehicle was enough to justify search).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

